Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 166.

THE HOMER RAMSDELL TRANSPORTATION COMPANY,
Plaintiff in Error,

vs.

LA COMPAGNIE GENERALE TRANSATLANTIQUE.

ARGUMENT FOR PLAINTIFF IN ERROR.

Statement of the Case.

The case comes to this Court on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

The action was brought originally in the Supreme Court of the State of New York and removed to the United States Circuit Court for the Southern District of New York. On consent of the parties it was referred to the Hon. William G. Choate to hear and determine the issues, pursuant to the rule of the Circuit Court, which is as follows :

"FEBRUARY 5TH, 1877.

"In actions at law a consent to a reference of the whole issue must likewise contain a provision that judgment shall not be entered until after ten

days' notice of the filing of the report of the Referee, and of the judgment proposed to be entered thereon. After a reference, at any time before the entry of judgment, either party may move for a new trial upon a case or exceptions, and, if such motion be denied, the decision of the motion and the questions involved in it may be entered on the record as if it had been a ruling made upon a trial by the Judge without a jury, and excepted to in like manner. When a motion for a new trial is intended to be made the Court may extend the time for entering judgment upon the application of the moving party, and may stay all other proceedings until the decision of the motion."

The case was tried before the Referee, who made his report in writing (fols. 16-21), and plaintiff's exceptions having been overruled and the report confirmed, judgment was entered against plaintiff dismissing the complaint with costs (fols. 40, 41). On writ of error to the Circuit Court the case was taken to the Circuit Court of Appeals for the Second Circuit, and two questions are certified to this Court under the provisions of Section 6 of the Act of March 3, 1891, establishing Circuit Courts of Appeal.

The action was brought to recover for damages to plaintiff's pier by the steamer *La Bretagne*, which collided with the pier on her outward voyage. The facts are sufficiently stated in the certificate from the United States Circuit Court of Appeals—the other findings of the Referee covering matters not in discussion before this Court. The statement of facts is as follows (fols. 2, 3):

"The defendant in error is a foreign corporation, owning and plying a regular line of steamers between Havre and New York. On the morning of December 10th, 1892, one of the defendant's

steamers, *La Bretagne*, while outward bound from the port of New York to Havre, by way of Sandy Hook, with cargo and passengers, struck the plaintiff's pier, damaging it to the amount of upwards of thirteen thousand (13,000) dollars. The said vessel at the time she left her pier was in all respects seaworthy and properly manned, equipped and supplied, and her owner exercised due diligence to make her so. She had on board a Sandy Hook pilot, duly licensed under and pursuant to the laws of the State of New York, and was navigated under his direction up to the time of said collision, and all his orders were promptly and efficiently obeyed and carried out by the master, officers and crew of said steamship. The said collision and the damage resulting therefrom were caused solely by the negligence and want of skill and care on the part of the said pilot, and not by any want of skill or negligence on the part of the master, other officers or crew of the said steamship."

The questions certified are as follows (fols. 3, 4):

First. Whether the provisions of Chapter 467 of ths laws of New York passed June 28, 1853, as amended by Chapter 196 of the laws of said State passed April 11, 1854; Chapter 243 of the laws of the said State passed April 3d, 1857; Chapter 930 of the laws of the said State passed May 16, 1867, and Chapter 548 of the laws of said State passed May 2, 1870, and consolidated into Sections 2093 to 2123, inclusive, of Chapter 410 of the laws of said State passed July 1, 1882, impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by way of Sandy Hook, in view of the decisions of the New York Court of Appeals.

Second. Whether in an action at common law the shipowner is liable for injuries inflicted exclusively by

negligence of a pilot accepted by a vessel compulsorily.

The only sections of the pilotage laws referred to, which affect the questions under discussion are Sections 2100, 2119 and 2120, as follows:

> "SEC. 2100. The said commissioners shall have the power to regulate the stationing of pilot boats for the purpose of receiving pilots from outward-bound vessels, may alter or amend any existing regulations of pilots, and make and duly promulgate and enforce new rules or regulations, not inconsistent with the laws of this state, or of the United States, which shall be binding and effectual upon all pilots licensed by them, and upon all parties employing such pilots. They may declare and enforce forfeitures of pilotage upon any mismanagement or neglect of duty by the pilots licensed by them; they may declare and impose and collect fines and penalties not exceeding Two hundred and fifty dollars for each offense, *to prevent any of the pilots licensed by them from combining injuriously with each other, or with other persons*, and to prevent any person licensed by them from acting as a pilot during his suspension, or after his license may be revoked; and the said commissioners may establish and enforce all other needful rules and regulations for the conduct and government of the pilots licensed by them, and the parties employing them; and they may enforce and receive accounts of all moneys collected for pilotage by the pilots licensed by them, and may impose and collect from such pilot a sum not exceeding three per cent. on the amount thereof, to defray their necessary expenses, including clerk hire and office rent. *Any pilot bringing in a vessel from sea shall, by himself or one of his boat's company, be entitled to pilot her to sea when she next leaves the port, unless, in the mean-*

time, a complaint for misconduct or incapacity shall have been made against such pilot or one of his boat's company, and proved before the Board of Commissioners of pilots; provided, however, that if the owner of any vessel shall desire to change such pilot, then the said commissioners may assign any other pilot on the same pilot boat to pilot said vessel to sea."

"SEC. 2119. * * * All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot, or in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage as if one had been employed; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel. Any person not holding a license as pilot under this title, or under the laws of the State of New Jersey, who shall pilot, or offer to pilot, any ship or vessel to or from the port of New York by the way of Sandy Hook, except such as are exempt by virtue of this title, or any master or person on board a steamtug or towboat, who shall tow such vessel or vessels, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding sixty days; and all persons employing a person to act of pilot, not holding a license under this title, or under the laws of the State of New Jersey, shall forfeit and pay to the board of commissioners of pilots the sum of one hundred dollars."

"SEC. 2120. Any person not holding a license as pilot under this title, or under the laws of the State of New Jersey, who shall pilot or offer to pilot any ship or vessel, not embraced in the preceding section, to or from the port of New York, by the way of Sandy Hook, shall be deemed

guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot not holding a license under this title, or under the laws of the State of New Jersey, shall forfeit and pay to the Board of Commissioners of Pilots the sum of one hundred dollars."

FIRST POINT.

The pilotage law applicable to New York harbor is not compulsory. For the outward voyage, at all events, there is no compulsory pilotage; no law interferes with the free choice by the master of any pilot licensed either under the laws of New York or those of New Jersey.

In defining compulsory pilotage there has been some diversity of opinion, but both the English Courts and this Court have agreed that statutes or rulings exempting owners from liability for the acts of pilots should be strictly construed. The definition was discussed by this Court in the following cases:

The China, 7 Wall. (174 U. S.), 53.
The Merrimac, 14 Wall. (81 U. S.), 199.
Sherlock vs. Alling, 3 Otto (93 U. S.), 99.

In the case of *The China*, the majority of the Court agreed in the opinion of Mr. Justice SWAYNE that, where the master was liable to pay pilotage in case of refusal to take a pilot, pilotage was compulsory. It was there assumed that the New York Pilot Law required the employment of the *pilot first offering his*

services. From this view Mr. Justice CLIFFORD and Mr. Justice FIELD dissented.

In the later case of the *Merrimac*, the following language was used by Mr. Justice CLIFFORD in an opinion which was concurred in by the whole Court :

> " State pilot laws, which compel the owners of vessels to pay half pilotage in cases where the pilot offers his services and they are refused—where the law is not enforced by any penalty—are not regarded as compulsory, and, therefore, the fact that the vessel was in charge of a pilot under such a law at the time of the collision is no defense to a libel for damages, if it appears that the collision was occasioned by negligence or unskillful navigation *(The Marcellus, 1 Cliff., 490).* Port regulations are supposed to be known to the shipowner before he sends his vessel on the voyage, and the general rule is that in sending her to any particular port he elects to submit to the lawful regulations established at that port, and that the vessel, in case she unlawfully collides with another vessel engaged in lawful commerce, shall be responsible *(The Carolus, 2 Curt. 69).* Where the law is not enforced by any penalty it is not regarded as compulsory, and, if not compulsory, the defense that the ship was in charge of a pilot is not a valid defense, which is all that need be said upon the subject *(Martin vs. Hilton, 9 Met., 371 ; Hunt vs. Carlisle, 1 Gray, 257).*"

In the case of *Sherlock vs. Alling*, more fully referred to hereafter, the rule is adopted that, where the master has the selection from among a class of licensed pilots, the law requiring the employment is not compulsory pilotage.

This rule is thus stated by the learned Referee in his opinion (fol. 27) :

"If the shipowner were at liberty to select a pilot out of a class of pilots licensed by the State, it could not be held that the shipowner was compelled to take the particular pilot employed."

The learned Referee has construed the effect of the New York pilot law in the following words (fols. 26, 27):

"There is no doubt in this case that the law of New York compels the ship to employ a pilot appointed by the State.

"By the New York Pilot law a foreign ship, when inward bound, *is obliged to take the first pilot that offers his services.* While the masters of certain vessels may be licensed to pilot their own vessels, it is provided in the statute that all vessels from foreign ports shall take a licensed pilot, or, in case of refusal, pay full pilotage; and it is further provided that any person not holding a license who pilots a vessel in or out of the harbor of New York shall be held guilty of a misdemeanor, and any one employing a person not holding a license to pilot a vessel shall forfeit and pay the sum of $100.

"The provision with regard to outward pilotage is that the pilot who brought in the ship has the right by himself or one of his boat's company to take her out unless he has been complained of for misconduct; subject, however, to the right of the shipowner to object to this particular pilot, in which case the commissioners of pilots shall assign another pilot from the same boat's company to take the ship out."

3 Rev. Stat. (7th Ed.), pp. 2017, 2019, 2020.

"If the shipowner were at liberty to select a pilot out of a class of pilots licensed by the State, it could not be held that the shipowner was compelled to take the particular pilot employed. But

the right to object to one particular pilot certainly does not make the appointment of another selected by the commissioners from the same boat's crew a voluntary appointment by the owner of the vessel of such substituted pilot.

"In the case of *The China*, 7 Wall., 53, the majority of the court held that the New York statutes created a system of compulsory pilotage. Both the master and the owner are subjected to penalties besides their liability to pay full pilotage in case of their refusal, and as to the master such refusal is expressly made a misdemeanor. It seems to me there can be no question that the pilotage is compulsory."

I have been unable to find any provision of law expressly making it a misdemeanor for the master to refuse to take a pilot. It is a misdemeanor for a master of a tug to tow a vessel without having a pilot's license, and it is also a misdemeanor for a person not holding a license to act or offer to act as a pilot. It is not, however, made a misdemeanor for a master to pilot his own vessel without having such license. It is provided by Section 2119 that the master refusing to take a pilot shall pay the pilotage as if one had been employed, and that all persons employing a person to act as pilot not holding a license under this title or under the laws of the State of New Jersey, shall forfeit and pay to the Commissioners the sum of one hundred dollars. It is only one who pilots, or offers to pilot or tows a ship, who shall be guilty of a misdemeanor.

The statute expressly enumerates the cases in which a master is liable, but does not include piloting his own vessel. It is evident that a master is not intended to be included in the general description of one "who pilots or offers to pilot a ship." Such a reading would violate the rule for strict construction of penal statutes.

So far as the New York statute imposes a penalty for violation of its provisions, it is construed strictly. *Sturgis vs. Spofford*, 45 N. Y., 446.

This view was apparently urged on the attention of the Court in the case of the *China*, but was not passed upon, as it was not deemed necessary for the decision of the case, the Court apparently assuming like the learned Referee, that it was obligatory to take the *first pilot who offered his services.*

> "It was contended by the counsel for the appellee that if the master had chosen to proceed without a pilot he would have been liable only to the payment of pilotage; and that none of the other penal provisions of the statute, according to its true meaning applied in such a case. We have not found it necessary to examine this subject. Giving to the statute either construction, it seems to us clear, in the light of both reason and authority, that the pilot was taken by the steamship upon compulsion" *(The China, supra).*

The less drastic construction referred to in these words is the liability to pay the first pilot who offered his services the amount of his pilotage in case of refusal to accept *his* services, thus depriving the master or owner of the freedom of choice, which is one of the elements in determining the relation of principal and agent.

Since the decision of this Court in the case of *The China*, the New York pilot law has been examined by the Court of Appeals of the State, and that Court has given a construction to it different from that of the learned Referee, and differing from that of this Court, in so far as the latter assumed that the law required the employment of the first pilot under penalty of paying pilotage fees to him, thus giving the master no right of selection from the class.

In the construction of statutes of a State this Court will follow the decisions of the highest Court of the State, and will "only form an independant judgment as to the meaning of the state law where there was no binding construction of such state statute by the court of last resort of the state."

Sioux City Term. R. R. & Warehouse Co. vs. Trust Co. of No. Amer., 173 U. S., 99.
Missouri, Kans. & Tex. Ry. Co. vs. McCann, 174 U. S., 580.

"If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest settled adjudications in preference to the earlier ones." Even where this Court has followed the construction of the State statute given by the highest Court of that State, and such earlier construction has been overruled by the State Court, this Court will follow "the later case, although it had previously adopted the rule laid down in the overruled cases."

Wade vs. Travis Co., 174 U. S., 499, 508.

The case of *The China* was decided in 1868, and in 1875 the statute was construed by the New York Court of Appeals, in *Brown vs. Elwell*, 60 N. Y., p. 249, and *Gillespie vs. Zittlosen*, 60 N. Y., p. 449.

In *Brown vs. Elwell* it was held that the Act of Congress of March 2, 1837, providing that the master of any vessel coming into or going out of any port situate upon waters which are the boundary between any two States may employ any pilot licensed or authorized by the law of either, must be read in connection with the New York pilot law, so that in all cases in the latter statute where the words "licensed pilot" are employed they must be held to mean a pilot licensed either under the laws of New Jersey or those of New York. The present statute follows this decision in its provisions.

Gillespie vs. Zittlosen was an action brought by a pilot who first spoke and offered his services to the

master of a brig sailing from a foreign port to the port of New York. The master refused to accept his services as pilot, but subsequently took another licensed pilot who piloted the brig into port. In the opinion written by Chief Justice CHURCH it is said:

> "The penalty or liability is imposed for not taking any pilot. It is only when no pilot is taken that pilotage must be paid as if one had been employed, and in that case only; that is when no pilot is taken the pilotage must be paid to the pilot first speaking.
>
> "There is no provision requiring a vessel to take the first pilot or to pay pilotage to him if he is not taken. If the pilotage, in case of refusal or neglect to take any pilot, had been payable to the commissioners of pilots, no question could have been raised; but the condition of liability is not affected by requiring it to be paid to the first pilot speaking. No other construction can properly be given to the language of this Act and we have no alternative but to give it effect. * * *
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> "The right of recovery by the first pilot in case of refusal to take any pilot, together with the chance of being employed, is an inducement to be vigilant, and it may have been deemed proper *to give the vessel some discretion in the selection of pilots* as well as the place where one should be taken.
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> "I am unable to see that the provisions of the Act are unwise or unjust. If it was designed to compel a vessel to take the first pilot, the Legislature would have said so. Courts have no right to change the plain terms of a statute."
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> *Gillespie vs. Zittlosen*, 60 N. Y., p. 449.

There is even greater liberty in the choice of a pilot for an outgoing vessel. Of an incoming vessel it may be said that the refusal of the first pilot offering his

services might occasion delay, and the master would incur the risk of not meeting any pilot and of encountering bad weather while waiting for one. While this would be equally true in all cases where the selection from a class of pilots was left wholly to the master, even these considerations would not affect the choice of a pilot for the outward voyage.

The learned Referee was of the opinion that this freedom of choice was abridged by Section 2100. We have already seen, however, that it is authoritatively decided that the Pilot Law will be strictly construed, and that a direction in a statute not enforced by penalty does not constitute compulsory pilotage. There being no penalty expressly provided for the violation of this direction (that the "pilot bringing a vessel from sea shall * * * be entitled to pilot her to sea when she next leaves the port"), the refusal to employ would be punished only under § 2119, which, as has been shown, does not interfere with the freedom of choice.

A closer examination of the particular section will, I think, make it clear that it was not intended to interfere with the choice of pilots by a master, but was a wholesome regulation of the conduct of pilots among themselves. It was to prevent them from combining to obtain employment, and, possibly, to relieve masters from importunity and annoyance. The section referred to is entirely taken up with the government and control of pilots by the Commissioners, and is not intended to define their rights or duties in relation to the employers. The section is here reprinted:

> "SEC. 2100. The said Commissioners shall have the power to regulate the stationing of pilot boats for the purpose of receiving pilots from outward-bound vessels, may alter or amend any existing regulations of pilots, and make and duly promulgate and enforce new rules or regulations, not inconsistent with the laws of this state, or of the

United States, which shall be binding and effectual upon all pilots licensed by them, and upon all parties employing such pilots. They may declare and enforce forfeitures of pilotage upon any mismanagement or neglect of duty by the pilots licensed by them ; they may declare and impose and collect fines and penalties not exceeding Two hundred and fifty dollars for each offence, *to prevent any of the pilots licensed by them from combining injuriously with each other, or with other persons,* and to prevent any person licensed by them from acting as a pilot during his suspension, or after his license may be revoked; and the said commissioners may establish and enforce all other needful rules and regulations for the conduct and government of the pilots licensed by them, and the parties employing them ; and they may enforce and receive accounts of all moneys collected for pilotage by the pilots licensed by them, and may impose and collect from such pilot a sum not exceeding three per cent. on the amount thereof, to defray their necessary expenses, including clerk hire and office rent. *Any pilot bringing in a vessel from sea shall, by himself or one of his boat's company, be entitled to pilot her to sea when she next leaves the port,* unless, in the meantime, a complaint for misconduct or incapacity shall have been against such pilot or one of his boat's company, and proved before the Board of Commissioners of pilots; provided, however, that if the owner of any vessel shall desire to change such pilot, then the said commissioners may assign any other pilot on the same pilot boat to pilot said vessel to sea."

It is respectfully submitted, therefore, that the pilot law of New York is not compulsory, for it does not interfere with the selection by the master of any pilot from among those licensed by either New York or New

Jersey; and in regard to the outward voyage there is no penalty for employing a different pilot from the one who brought the vessel in, the provision of the law in that respect being only "to prevent any of the pilots licensed by them from combining injuriously with each other or with other persons."

SECOND POINT.

A licensed pilot, even where pilotage is compulsory, is the servant of the owner, and the owner is liable for the pilot's negligence. This liability may be enforced as well by action at common law in personam as in admiralty in rem.

The learned Referee concedes that the law is well settled that in Admiralty *in rem*, the vessel is liable for the negligent acts of a pilot compulsorily employed. Indeed, since the case of *The China*, where the law was most carefully examined and applied to the pilotage laws of New York, the question has been considered no longer open to discussion. The Court was unanimous in this conclusion, although Justices CLIFFORD and FIELD expressed the opinion that a provision compelling payment of pilotage fees, where a pilot was refused, did not make the statute one of compulsory pilotage.

Pilotboat Washington vs. Saluda, U. S. Dist. Ct., S. C., April, 1831.
Story on Bailments, Secs. 399, 400.
The China, 7 Wallace (74 U. S.), Rep. p. 53.
Atlee vs. Norn. Packet Co., 21 Wallace (88 U. S.), p. 389.
The Neptune, 1 Dodson R., 467.
The Merrimac, 14 Wallace, (81 U. S.), 199.
Sherlock vs. Alling, 3 Otto (93 U. S.), 99.
The E. M. Norton, 15 Fed. Rep., 686.

The learned Referee also concedes that the action is properly brought at common law and that a suit in admiralty would not lie, and cites authority for such opinion (fol. 27).

He also accepts the dictum (fol. 37) that the liability of the owner *in personam* by the maritime law is the same as at common law.

Conceding all this however, the learned Referee proceeds (fol. 38):

> "While, therefore, it must be admitted that there is some authority, and many *dicta* in favor of holding the owner of a vessel liable for the negligence of a pilot compulsorily imposed upon the vessel, I have come to the conclusion that, both upon reason and authority, the rule is otherwise, and that, therefore, the defendant in this case is entitled to judgment."

The same cases cited by the learned Referee were examined by this Court in *The China;* the same reasons were ably argued and pressed upon the attention of this Court; the whole matter has been reexamined and the conclusions reaffirmed by this Court, and yet he says that, "with the utmost respect for the Courts" reaching that conclusion, he is "unable to follow them."

It was strenuously urged both before the Referee and the Circuit Court of Appeals that there was a distinction between the maritime law as applied in courts of Admiralty and the common law as applied in other courts; and the learned Referee, while conceding that the law is settled in the former forum, bases his conclusion in the present case on such distinction.

When the law was first examined by this Court the argument seems to have been urged that courts of Admiralty would not follow common-law precedents in sustaining the liability of the owner for the pilot's acts. On this point Mr. Justice SWAYNE said:

"The immunity of the wrongdoing vessel when the pilot is in charge, and alone in fault, is now well settled in English jurisprudence, both in the Admiralty Court and in the courts of common law. *The rule must necessarily be the same in both.* In such cases the liability of the ship and of the owner are convertible terms. *The ship is not liable if the owners are not;* and no responsibility can attach to the owners if the ship is not liable to be proceeded against (*The Druid*, 1 Wm. Rob., 399)."

The *China*, *supra*.

In the case of the *Druid* Dr. LUSHINGTON expresses the rule in the following words:

"In all causes of action which may arise from circumstances occuring *during the ownership of the person whose ship is proceeded against* I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship and the responsibility of the owners, in such cases, are convertible terms. The ship is not liable if the owners are not responsible, and *vice versa*, no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against" (p. 399).

In the court below it was said by counsel that this rule had been modified in the case of the *Bold Buccleugh*, 3 Wm. Rob., 220. This was an opinion also by Dr. LUSHINGTON, in which he expressly affirmed the doctrine of the *Druid* case so far as it applies to the matter now under discussion, the only question being whether the ship in the hands of subsequent owners would remain liable. I have been unable to find any

authority questioning the rule that the liability of the ship and that of the owners at the time of the accident are convertible terms.

Lord SELWYN has thus expressed the rule in the case of the *Halley*, Law Rep., 2 P. C. App., p. 193 :

> " It is admitted that the question must be decided upon the same principles as would be applicable to an action for damages for the collision in question if commenced in the Court of Queen's Bench or Common Pleas. * * *
>
> " In cases like the present, when damages are claimed for tortious collisions, a chattel, such as a ship or carriage, may be, and frequently is, figuratively spoken of as the wrongdoer, but it is obvious that, although redress may sometimes be obtained by means of the seizure and sale of the ship or carriage, the chattel itself is only the instrument by the improper use of which the injury is inflicted by the real wrongdoer " (at p. 202).

The leading case in Admiralty in this Court, *The China*, was decided on the authority of common law cases, and the reasoning in both classes of cases is the same.

Yates vs. Brown, 8 Pick., 23.
Bussy vs. Donaldson, 4 Dall. R., 206.
Fletcher vs. Braddick, 5 Bos. and Pull., 182.
Williamson vs. Price, 15 Martin (Lous.), 399.
Dennison vs. Seymour, 9 Wend., 8, 15.
The Eliza vs. The Decatur, *2 Whart. Dig.. p. 685, Sec. 524 :* (This case is there reported as decided in the U. S. D. C., 1825, Ms.).

In discussing the effect of compulsory pilotage Mr. Justice SWAYNE quotes with approval the following language from *Bussy vs. Donaldson :*

" The legislative regulations were not intended to alter or obliterate the principles of law by which the

owner of a vessel was previously responsible for the conduct of the pilot, but to secure in favor of every person—strangers as well as residents—trading to our port, a class of experienced, skillful and honest mariners to navigate their vessels safely up the Bay and the River Delaware. *The mere right of choice is indeed one, but not the only, reason why the law in general makes the master responsible for the acts of his servant,* and in many cases where the responsibility is allowed to exist the servant may not, in fact, be the choice of the master." Citing with approval *Williamson vs. Price, Yates vs. Brown* and *Dennison vs. Seymour*, referred to above.

The opinion of Mr. Justice SWAYNE proceeds as follows:

> " In the case of *The Creole*, decided by Mr. Justice GRIER on the circuit in the year 1853, 2 Wall., Jr., 485, the subject underwent a learned and thorough examination, both by counsel and the Court. The result was the same as in *Bussy vs. Donaldson*. It appears by that case that Mr. Justice WAYNE had ruled the point in the same way in his circuit. No American adjudication to the contrary has been brought to our attention.
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> " The question is now, for the first time, presented in this Court.
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> " The New York statute creates a system of pilotage regulations. It does not attempt, in terms, to give immunity to a wrongdoing vessel. Such a provision in a State law would present an important question, which, in this case, it is not necessary to consider.
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> " The argument for the appellants proceeds upon the general legal principle that one shall not be liable for the tort of another imposed upon him by the law, and who is, therefore, not his servant or agent (15 East, 189; 4 M. & S., 77; 6 B. & C., 657; *Milligan v. Wedge*, 12 Adol. & Ell., 737; *Reedie v. Railway Company*, 4 Exch., 244).

" The reasoning by which the application of this principle to the case before us is attempted to be maintained is specious rather than solid. It is necessary that both outward and inward bound vessels, of the classes designated in the statute, should have pilots possessing full knowledge of the pilot grounds over which they are to be conducted. The statute seeks to supply this want, and to prevent, as far as possible, the evils likely to follow from ignorance or mistake as to the qualifications of those to be employed, by providing a body of trained and skillful seamen, at all times ready for the service, holding out to them sufficient inducements to prepare themselves for the discharge of their duties, and to pursue a business attended with so much of peril and hardship. The services of the pilot are as much for the benefit of the vessel and cargo as those of the captain and crew. His compensation comes from the same source as theirs. Like them he serves the owner and is paid by the owner. If there be any default on his part, the owner has the same remedies against him as against other delinquents on board. The difference between his relations and those of the master is one rather of form than substance. It is the duty of a master to interfere in cases of the pilot's intoxication or manifest incapacity, in cases of danger which he does not forsee, and in all cases of great necessity (*The Argo* 1 Swab., 464; *The Christiana*, 7 Moore, P. C., 172). The master has the same power to displace the pilot that he has to remove any subardinate officer of the vessel. He may exercise it or not, according to his discretion. * * *

" The maxim of the civil law—*sic utere tuo ut alienum non lædas*—may, however, be fitly applied in such cases as the one before us. The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He

would often be unable to respond by payment—especially if the amount recovered were large. Thus, where the injury was the greatest, there would be the greatest danger of a failure of justice. * * * All port regulations are compulsory. The provisions of the Statute of New York are a part of the series within that category. A damaging vessel is no more excused because she was compelled to obey one than another. The only question in all such cases is, was she in fault? The appellants were bound to know the law. They cannot plead ignorance. The law of the place makes them liable. This ship was brought voluntarily within the sphere of its operation and they cannot complain because it throws the loss upon them rather than upon the owners of the innocent vessel. We think the rule which works this result is a wise and salutary one, and we feel no disposition to disturb it.

"The steamship is a foreign vessel. We have, therefore, considered the learned and able argument of the counsel for the appellants with more care than we should otherwise have deemed necessary. Maritime jurisprudence is a part of the law of nations. We have been impressed with the importance of its right administration in this case."

The China, 7 Wall. (74 U. S.), 53.

It was said by counsel, on the argument in the Court below, that this Court placed great stress on the judgment of Sir ROBERT PHILLIMORE, in the case of the *Halley*, and adopted his reasoning against the other cases cited, but that the case of the *Halley* was afterwards reversed in the Privy Council. The appeal was decided in 1868, and I have quoted some extracts from the opinion of Lord SELWYN on the appeal. The Privy Council expressly approves of the statement of the English law made by Dr. Lushington, but reverses the

judgment, holding that the English Courts would not enforce the liability of the ship owner imposed by the Belgian law, but would apply the *lex fori*. The reversal of that case did not make any change in the law of England, and it was the workings of the law there affirmed of which it was said by this Court, "these results furnish little inducement to establish the principle in our jurisprudence" *(The China, supra).*

So, too, in *Sherlock vs. Alling*, 93 U. S., p. 99, more fully referred to hereafter, this Court in 1876, eight years after the decision of the *Halley* on appeal, deliberately adopted the reasoning of Sir ROBERT PHILLIMORE based on the natural justice of the doctrine, in preference to the narrower rule which had become crystalized in the English statutes; for it will be remembered that the statute gave immunity to the owner irrespective of any common law right.

The question again came before this Court in 1872, more than three years after the case of *The China* was decided and the doctrine was reaffirmed.

The Merrimac, 14 Wall. (81 U. S.), 199.

Again in 1874 the owner was held liable for the negligent act of a pilot causing a collision.

Atlee vs. The N. W. Union Packet Company, 21 Wall. (88 U. S.), 389.

All three of these cases, it is true, were suits in admiralty, but, as pointed out before, the liability was sustained because the common-law liability was found to exist.

The learned Referee seems to have overlooked entirely the case of *Sherlock vs. Alling*, which was an action at common law carried to this Court in error to the Supreme Court of Indiana. It was an action at common law for causing the death of a passenger in a collision on the Ohio River, and the defendants interposed the defense that the steamboat was under the control of pilots compulsorily employed

by them under Act of Congress of March 30, 1852. The case was decided in 1876 and the opinion was written by Mr. Justice FIELD, who participated in the decision of *The China* case, and united with Mr. Justice CLIFFORD in dissenting on the construction of the New York statute. The opinion is so comprehensive and luminous that it is here reprinted in full so far as it deals with this defense.

"In addition to the objection urged to the statute of Indiana, the defendants also contended that, as owners of the colliding vessels, they were exempt from liability to the deceased, as a passenger on one of them, and, of course, to his representatives, as the collision was caused, without any fault of theirs, by the negligence of the pilots; and they relied upon the 30th Section of the Act of Congress of March 30, 1852, to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam. That act was in force when the injuries complained of in this case were committed, and its principal features have been retained in subsequent legislation. The section provided: 'That whenever damage is sustained by any passenger or his baggage from explosion, fire, collision or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured to the full amount of damage, if it happens through any neglect to comply with the provisions of law herein prescribed, or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence or willful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of the law herein prescribed as to navigating such steamers, may sue such engineer or pilot and re-

cover damages for any such injury caused as aforesaid by any such engineer or pilot'" (10 Stat. at L., 72).

"It was argued that, by this section, Congress intended the exemption claimed. And confirmation of this view was found in the fact that the owners were obliged to take a pilot and were restricted in their choice to those licensed by the Government inspectors. It was supposed that the relation between owner and pilot, as that of master and employee, was thus changed, and that with the change the responsibility of the former for the negligence of the latter ceased. The Court, however, proceeded through the trial upon a different theory of the position of the defendants. It held that, as owners, they were responsible for the conduct of all the officers and employees of the vessels, and that it was immaterial whether the vessels were or not at the time of the collision under the exclusive charge of the pilots. The instruction to the jury, at least, went to that extent. They in substance declared that if the collision occurred within the territorial jurisdiction of Indiana, and was caused without fault of the deceased by the carelessness or misconduct of the defendants, or any of their agents, servants or employees, in navigating and managing the steamers, or either of them, the plaintiff was entitled to recover.

"In support of the exemption, the counsel of the defendants called to our attention an opinion of the Supreme Court of Kentucky in a similar case, arising upon the same collision, where such exemption was upheld. The opinion is marked by the usual ability which characterizes the judgments of that Court; but, after much hesitation and doubt, we have been compelled to dissent from its conclusions. The statute appears to us to declare that the owners and master of a steam

vessel, and the vessel itself, shall be liable for all damages sustained by a passenger or his baggage, from any neglect to comply with the provisions of the law, no matter where the fault may lie; and that, in addition to this remedy, any person injured by the negligence of the pilot or engineer may have his action directly against those officers.

"The occasions upon which a pilot or engineer would be able to respond to any considerable amount would be exceptional. The Statute of England, which exempts the owners of vessels and the vessels from liability of faults of pilots, pilotage there being compulsory and pilots being licensed, has not met with much commendation from the Admiralty Courts, and the general tendency of their adjudications has been to construe the exemption with great strictness. This course of decision is very fully stated in the exposition of the law made by Mr. Justice SWAYNE, in the case of *The China*, 7 Wall., 53 (74 U. S., 67), where this Court declined to hold that compulsory pilotage relieved the vessel from liability. In the case of *The Halley*, L. R., 2 Adm. and Eccl., 15, decided as recently as 1867, Sir ROBERT PHILLIMORE strongly questioned the policy of the statute, and said that it appeared to him difficult to reconcile the claims of natural justice with the law which exempted the owner who had a licensed pilot on board from liability for the injuries done by the bad navigation of his vessel to the property of an innocent owner; and observed that no one acquainted with the working of the law could be ignorant that it was fruitful in injustice. The doctrine that the owners are responsible for the acts of their agents and employees ought not be discarded because the selection of a pilot by the owner is limited to those who, by the State, have been found by examination to possess the requisite knowledge of the difficulties of local navigation, and the requisite skill to con-

duct a vessel through them. 'As a general rule,' says Mr. Justice GRIER, in the case of *The Creole*, 'masters of vessels are not expected to be, and cannot be, acquainted with the rocks and shoals on every coast (and, we may add, with the currents and shoals of every river), nor able to conduct a vessel safely into every port. Nor can the absent owners, or their agent, the master, be supposed cabable of judging of the capacity of persons offering to serve as pilots. They need a servant but are not in a situation to test or judge of his qualifications, and have not, therefore the information necessary to choice. The pilot laws kindly interfere, and do that for the owneas which they could not do for themselves' *Smith vs. The Creole* and *The Sampson*, 2 Wall., Jr., 515. And the learned Justice observes, that in such cases where a pilot is required to be taken from those licensed, *the relation of master and servant is not changed; that the pilot continues the servant of the owners, acting in their employ, and receiving wages for services rendered to them, and that the fact that he is selected for them by persons more capable of judging of his qualifications cannot alter the relation.*"

"And in case of *The Halley*, Sir ROBERT PHILLIMORE upon this subject says: 'I do not quite understand why, because the State insists, on the one hand, upon all persons who exercise the office of pilot, within certain districts, being duly educated for the purpose and having a certificate of their fitness; and insists, on the other hand, that the master shall, within these districts, take one of these persons on board to superintend the steering of his vessel, the usual relation of owner and servant is to be entirely at an end; and still less do I see why the sufferer is to be deprived of all practical redress for injuries inflicted upon him by the ship which such a pilot navigates.'

"*By the common law, the owners are responsible for the damages committed by their vessel, without*

any reference to the particular agent by whose negligence the injury was committed. By the maritime law, the vessel, as well as the owners, is liable to the party injured for damages caused by its torts. By that law, the vessel is deemed to be an offending thing, and may be prosecuted, without any reference to the adjustment of responsibility between the owners and employees, for the negligence which resulted in the injury. *Any departure from this liability of the owners of the vessel, except as the liability of the former may be released by a surrender of the vessel, has been found in practice to work great injustice.* The statute ought to be very clear before we should conclude that any such departure was intended by Congress. The section we have cited would not justify such a conclusion. Its language readily admits of the construction we have given, and that construction is in harmony with the purposes of the Act."

Sherlock vs. Alling, 3 Otto (93 U. S), p. 99.

In the Circuit Court for the Eastern District of Louisiana, in January, 1883, the question again came up in admiralty, and these cases were followed as authority.

The act causing the injury was done by the pilot "over the objection of the master." "For this negligence or want of skill the owner or boat is responsible, although a licensed pilot was the real delinquent." Per Mr. Justice PARDEE.

The E. M. Norton, 15 Fed. Rep., 686.

It is respectfully submitted that the learned Referee was in error in refusing to follow the rule of law firmly established by the decisions of this Court, on the ground that such decisions were binding only in Courts of Admiralty.

Having found that the plaintiff in error was remediless in Admiralty, the effect of his decision is to relieve the owner of any liability for the act of a pilot result-

ing in the destruction of a pier, although both he and the vessel would be liable for the same act, resulting in the destruction of an anchored vessel.

THIRD POINT.

The questions certified by the Circuit Court of Appeals are reviewable in this Court.

On the argument in the Circuit Court of Appeals it was urged that, "the Referee having found as matter of fact that the New York Act requires that a pilot in this case is compulsory, that question is not open to review in this Court," and the case of *Shipman vs. Straitsville Central Mining Company* (158 U. S., p. 536) was cited as authority for the proposition.

This action was tried before Hon. William G. Choate, to whom it had been referred as Referee to hear and determine by consent of the parties, according to the rule of the Circuit Court, and, the exceptions filed to his report having been overruled, judgment was directed by the Circuit Court accordingly (fol. 41). The Referee in his report made findings of fact with the conclusion of law that defendant was entitled to judgment dismissing the complaint upon the merits. The thirteenth finding was as follows (fol. 31):

> "THIRTEENTH. The said pilot was not appointed by the owner of said vessel, nor by the master thereof, but the said owner and master were required and compelled by the law of the State of New York to take said pilot and to allow him to take charge of the navigation of said vessel."

The sole conclusion of law was that the complaint should be dismissed, and the plaintiff in error concedes that the facts found by the Referee cannot be re-examined either in this Court or the Circuit Court of Appeals, and that the case above cited is conclusive authority upon that point.

The Circuit Court of Appeals, however, held that the construction of the New York statute was in reality a question of law and not of fact, and that the conclusion of the Referee as to the effect of the statute could, therefore, be reviewed in that Court. That Court has not included the finding of the Referee on this point in the statement of facts, but has certified only that the vessel was navigated under direction of a Sandy Hook pilot, duly licensed under the law of the State. The same point has been recently passed upon by this Court in the case of *Houston and Texas Central Railroad Company vs. State of Texas* (177 U. S., p. 66), where the State Court had found that warrants issued under and by virtue of certain Acts of the Legislature were issued with the intention to have them circulate as money. Mr. Justice PECKHAM, writing the opinion of this Court, said (p. 80):

> "The question whether the Legislature so intended is one to be decided by an inspection of the act under which they were issued, and possibly by reference to the text of other acts of the legislature enacted at or about the same time. Whether an act provides for the issuing of warrants that were intended to circulate as money is in reality a question of law arising upon the construction of the legislative act; and a finding by the Court that warrants issued under and by virtue of certain acts of the legislature were issued with such intention is in the nature of a legal conclusion, and not a finding of fact, and therefore it can be reviewed by this Court."

See, also, *Chicago, Milwaukee and St. Paul Railway Company vs. Clark* (178 U. S., 353):

This case also was tried before a Referee appointed under the same rule, and it was held that both in the Circuit Court of Appeals and in this Court the Referee's findings could be examined to ascertain whether the judgment was supported by the facts found, and his findings would be construed for that purpose.

So, in the present case, while plaintiff in error may not question that the pilot was appointed pursuant to the Statute of the State of New York, the effect of such appointment is a question of law, not a question of fact, and the Circuit Court has so construed it in certifying that question to this Court. That this is the meaning of the Referee's finding is abundantly proven by reference to other parts of the record. The third and fourth defenses (fols. 13 and 14), use the same expression, and the learned Referee, in his opinion (fols. 26–27), discusses the effect of the New York statute, placing his conclusion that the New York Statute created a system of compulsory pilotage upon the authority of the case of *The China (supra)*, without referring to the subsequent cases decided by the New York Court of Appeals.

It is respectfully submitted, therefore, that so far as the finding of the Referee attempts to construe the character of the New York Statute it is a legal conclusion and not a finding of fact.

FOURTH POINT.

It is respectfully submitted that the first question certified to this Court should be answered in the negative, viz.: that the New York laws do not impose compulsory pilotage; and that the second question should be answered in the affirmative, establishing the liability of the owner; and that the case should be remitted for appropriate action in the Circuit Court of Appeals.

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